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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICROSOFT CORPORATION, *et al.*,
Petitioners,

v.

DONNA VIZCAINO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICI CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States (the "Chamber") and the Association of Private Pension and Welfare Plans (the "APPWP"), (collectively the "Amici") respectfully move this Court for leave to file the accompanying brief as amici curiae in support of the writ for certiorari filed by Petitioners Microsoft Corporation, *et al.* ("Microsoft"). The written consent of Petitioners for the submission of this brief has been filed with the Clerk of the Court. Counsel for Respondents refused to consent to the filing of this brief.

In support of this motion, the Amici show the following:

1. The Chamber is the world's largest business federation representing an underlying membership of more than three million businesses and organizations of every size, sector, and region. Ninety-six percent of the Chamber's

members are businesses with less than 100 employees. The Chamber regularly advocates the interests of its members in courts throughout the country on issues of national concern to the business community. This case is important to the Chamber and all of its members that supply and use freelancers to meet critical business needs.

2. The APPWP is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of this nation's private employer-sponsored employee benefit plan system. The members of the APPWP include both small and large employer sponsors (including many Fortune 500 companies) of employee benefit plans, as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 240 members sponsor or administer plans covering more than 100 million plan participants. This broad-based membership provides the APPWP with substantial expertise and experience in the entire spectrum of issues relating to all types of benefit plans.

3. Amici have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this appeal, which transcend the interests of the parties to this case.

4. A significant segment of Amici membership contract regularly with contingent workers, independent contractors, freelancers, and/or temporary employees (collectively "freelancers"), and thus have a great interest in the agreements under which freelancers work. A recent study by the Bureau of Labor Statistics estimated that 5.6 million individuals hold jobs as freelancers in the United States.[1] Other studies estimate that between 1980 and 1993, freelancers made up approximately 25-30% of the United States work force, and that the number of freelancers grew

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[1] Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements, 1 February 1997 (1997).

approximately 40-75% faster than the overall workforce during that period, with 40-55% of the jobs created in that time period consisting of freelance positions.[2] Some estimate that temporary work has grown ten times faster than overall employment since 1982.[3] According to one commentator, "[i]t is expected that [freelancers] will comprise one-half of the labor force by the year 2000.[4]

5. This case raises grave concerns about the ability of businesses to contract with freelancers without embracing unknown and potentially crippling additional costs arising through subsequent litigation. Amici's membership contract with freelancers to supply important skills which businesses cannot replicate without the substantial costs of hiring and training their own employees. Flexible freelance arrangements also allow the Amici membership to provide services in situations where employment costs would be prohibitive. At the same time, working on a temporary or part-time freelance basis brings more workers into the marketplace by allowing them the freedom and flexibility to structure their own lives, and to reap important tax advantages available only to independent businesspeople. Both businesses and freelancers should remain free to create their own mutually acceptable bargains, which may include—as in this case—an agreement to forego employee benefits in exchange for higher compensation. Where knowingly and deliberately arranged, such agreements should be respected and not subject to ex post facto revision through litigation.

6. The issue raised by the Petition—whether individuals who execute written freelance agreements specifically

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[2] Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 Wash. & Lee L. Rev. 863, 867-868 (1995).

[3] Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 Wash. & Lee L. Rev. 739, 741 (1995).

[4] Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 Wash. & Lee L. Rev. 731, 732 (1995).

acknowledging that they are not entitled to employee benefits subsequently may sue for such benefits by claiming that they are common law employees—is of direct and immediate interest to the Amici and their members. Amici and their members wish to preserve their right to contract with freelancers on mutually advantageous terms, which may include agreements concerning the availability of benefits. The decision below threatens this freedom, and thereby jeopardizes the stability of this large segment of the American workforce.

WHEREFORE, for the reasons stated, the Amici respectfully request that the Court grant it leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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QUESTION PRESENTED

May an individual who executes a written freelance agreement specifically acknowledging that he is not entitled to employee benefits subsequently sue for such benefits by claiming that he is a common law employee?

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICI CURIAE IN SUPPORT OF THE PETITION

This Brief is submitted by the Chamber of Commerce of the United States and the Association of Private Pension and Welfare Plans (collectively, the "Amici") as amici curiae in support of Petitioners' request for writ of certiorari.

INTEREST OF AMICI CURIAE [1]

The interest of the amici curiae is fully set forth in the accompanying motion for leave to file this brief.

STATEMENT OF FACTS

Petitioner Microsoft ("Microsoft") established an Employee Stock Purchase Plan ("ESPP") in 1986. Petition Appendix ("Pet. App.") at A42. The ESPP currently provides benefits to Microsoft employees. Pet. App. at A17. The ESPP is a qualified employee stock purchase plan under § 423 of the Internal Revenue Code of 1986 *as amended*, (the "Code").[2] Pet. App. at A5. The ESPP is a contract governed by state law, and is not subject to the Employee Retirement Income Security Act of 1974, *as amended*, ("ERISA") because it does not provide the type of benefits provided by ERISA plans. Pet. App. at A5. *See also* 29 U.S.C. §§ 1002(1) & 1002(2) (listing the types of benefits provided by employee welfare benefit

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[1] No counsel for any party authored any part of this brief, and no person other than amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of the brief.

[2] According to § 421(a) of the Code, "[i]f a share of stock is transferred to an individual in a transfer in respect of which the requirements of section . . . 423(a) are met [,] no income shall result at the time of the transfer of such share to the individual upon his exercise of the option with respect to such share . . ." (enumeration omitted).

plans and employee pension benefit plans); Department of Labor Advisory Opinion 90-17A (June 25, 1990) (stating that an employee stock purchase plan is not covered by ERISA).

Each Respondent executed a contract with Microsoft expressly acknowledging that he or she was an independent contractor and agreeing that, as an independent contractor, he or she would "be responsible for all federal and state taxes, withholding, social security, *insurance and other benefits.*" Pet. App. at A27 (emphasis added). Each further agreed that "as an Independent Contractor to Microsoft, you are self-employed and are *responsible to pay all your own insurance and benefits.*" Pet. App. at A27 (emphasis added). Each individual knew and voluntarily accepted the position under the conditions offered, which included higher compensation in lieu of employee benefits. Pet. App. at A64-A67.

Despite these specific agreements, in 1989 the Internal Revenue Service (the "Service") in a tax audit concluded that Respondents should be characterized as employees rather than independent contractors for withholding and employment tax purposes. Pet. App. at A86. The Service did not invalidate the underlying contracts between Respondents and Microsoft, nor did it make any determination regarding Respondents' participation in the ESPP or other employee benefit plans available to Microsoft workers. Pet. App. at A87.

Following the Service's determination, Respondents brought suit, claiming that their status as common law "employees" for withholding and employment tax purposes entitled them to participate in the ESPP regardless of the express terms of their contracts.[3] Pet. App. at A74. The District Court held that each Respondent knew, either at the time he began providing services or shortly there-

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[3] They also claimed eligibility to participate in other Microsoft employee benefit plans, including a 401(k) Savings Plus Plan ("SPP"), which is governed by ERISA. Pet. App. at A2; A5.

after, that he was not entitled to employee benefits but nonetheless continued providing services to Microsoft under the contract. Pet. App. at A74-A75. Accordingly, the District Court determined that as a matter of state contract law, the specific terms of Respondents' contracts controlled, and granted summary judgment to Microsoft. Pet. App. at A73-A77.

A Ninth Circuit panel reversed. Over the dissent of Judge Trott, the panel concluded that because the ESPP was intended as a tax qualified plan under the Code and because the Code requires that qualified employee stock purchase plans offer stock purchase benefits to all common law employees, Respondents were entitled to participate despite their express agreements to the contrary.[4] Pet. App. at A54-A61. Rejecting Microsoft's argument that Respondents were seeking a private right of action to enforce provisions of the Code, the panel concluded that by promulgating an employee stock purchase plan designed to qualify under the Code, Microsoft intended to extend stock purchase benefits to all individuals deemed common law employees regardless of any specific agreements to the contrary. Pet. App. at A54-A61.

A divided court affirmed *en banc*.[5] The majority again concluded that Respondents were eligible for stock purchase benefits because the plan was designed to comply with the Code, and because § 423 of the Code requires that all employees be allowed to participate in employee

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[4] The panel further found that Respondents were entitled to participate in the SPP under ERISA because they were "on the United States payroll of the employer", even though they were paid as independent contractors and not payroll employees throughout their tenure. Pet. App. at A45-A54.

[5] The *en banc* majority remanded Respondents' eligibility for benefits under the ERISA-governed SPP to the plan administrator for consideration, although concluding that the plan administrator's apparent reason for denying benefits to Respondents (that Respondents waived the benefits) was "arbitrary and capricious" as a matter of law. Pet. App. at A13-A16.

stock purchase plans as a condition of receiving favorable tax treatment. Pet. App. at A16-A17. The majority held that the express contracts between Respondents and Microsoft were not controlling, but instead constituted mere "helpful disclosure[s]". Pet. App. at A9. Instead, the majority concluded that the ESPP itself constituted a binding offer of a contract for stock purchase benefits under state law extended to all common law employees of Microsoft, and that Respondents accepted this offer by working for Microsoft, albeit pursuant to individual contracts which specifically negated any eligibility for employee benefits. Pet. App. at A16-A17. Three circuit judges dissented, relying upon state contract law precedent premised upon the actual rather than the legally presumed intentions of the parties. Pet. App. at A25-A36.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A FEDERAL RULE OF LAW WHICH THREATENS THE STABILITY OF THE WORKPLACE AND GRANTS A PRIVATE RIGHT OF ACTION TO ENFORCE THE INTERNAL REVENUE CODE.

A. The Decision Below Creates a Federal Rule of Law Which Threatens the Stability of the Workplace.

The decision below, while purporting to interpret state law, in fact creates a uniform federal common law rule that every employee stock purchase plan which seeks to qualify under the Code (which includes every such plan)[6] must be construed to extend benefits to every common law employee, and that specific agreements to the contrary are unavailing and unenforceable as a matter of

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[6] Stock purchase plans normally are qualified under the Code to defer taxation of income to employees. Employers, may, however, establish non-qualified stock purchase programs for their employees, in which case the employee's receipt of employer stock is a taxable event.

law.[7] That rule creates grave risks to essential attributes of freedom of contract which govern the burgeoning freelancer workforce throughout the United States. The Ninth Circuit's rule will also engender broad-scale class litigation on behalf of workers who accepted the benefits of freelance status but seek to revise their bargain through subsequent litigation.

The Court long has understood the primacy of freedom of contract, noting that the contract clause in the Constitution embodies

> the high value the Framers placed on the protection of private contracts. Contracts enable private individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). Indeed, "[m]arket efficiency requires effective means to enforce private agreements." *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817, 824 (1995).

Yet the decision below not only ignores express private agreements regarding the availability of employee benefits, but finds those agreements insufficient as a matter of law to overcome a legal presumption (based upon federal tax laws) that every employee stock purchase plan which seeks tax qualified status necessarily intends to extend benefits to every person found to be a common law employee. If the Ninth Circuit is correct, the availability of employee benefits will always be governed by whether an individual is a common law employee, and the stability and predictability afforded by private contracts specifically

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[7] The *en banc* majority did not specifically endorse such a blanket rule for ERISA plans, although it did state that a decision denying benefits to common law employees under such plans on the grounds that the individuals waived the benefits was arbitrary and capricious as a matter of law. Pet. App. at A13.

defining whether an individual is entitled to benefits must be disregarded.

Basing benefit eligibility solely and exclusively upon common law employee status without regard to specific private agreements places businesses at serious risk of dramatically enhanced costs and broad-scale benefit litigation. The Court has noted many times that the distinction between an independent contractor and a common law employee is imprecise at best:

> [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).[8]

A rule which places businesses at multi-million dollar class action risk from misclassification of independent contractors under the common law agency test has nothing to recommend it. Indeed, such a rule sacrifices the stability and predictability essential for American business, which is constantly faced with decisions about staffing and workforce development which involve, *inter alia*, comparative costs for employees and independent contractors. Businesses which decide to have particular tasks performed by individuals who freely agree they are engaged as inde-

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[8] The complexity of this inquiry was described by the General Accounting Office as follows:

> [M]any employers struggle in making the [employee/independent contractor] classification decision because of the unclear rules. Until the classification rules are clarified, we are not optimistic that the confusion over who is an independent contractor and who is an employee can be avoided.

Pet. App. at A67-68 & n.1; *and see* James E. Merritt, *Understanding and Mitigating the Consequences of Reclassification of Workers from Independent Contractors to Employees*, 43 Major Tax Planning ¶ 1200 *et seq.* (1991).

pendent contractors and reap the benefits thereof [9] should not be placed at huge financial risk through subsequent litigation based upon the inherently unclear common law distinction between independent contractors and employees. Absent action by the Court, these risks are certain to grow dramatically as the number of freelance workers continues to increase and more lawsuits like this one are brought.

B. The Decision Below Grants Respondents a Private Right of Action to Enforce the Provisions of the Internal Revenue Code.

Not only does the decision below threaten to disrupt the workplace; it is legally flawed because it grants Respondents an unprecedented private right of action to enforce provisions of the Code. The majority below reasoned that Respondents were entitled to prevail in their suit for benefits because the ESPP was designed to qualify for the tax advantages provided by the Code. Yet behind the majority's facade of contractual intent under state law lies the proposition that a stated desire to comply with the federal tax laws necessarily means that individuals who would benefit from a particular construction may enforce compliance with those laws through lawsuits such as this.

That does not follow as a matter of logic, and certainly does not follow as a matter of law. Logically, Microsoft may have jeopardized the tax qualified status of its plan by its specific agreements with Respondents. If so, it is responsible for the consequences. But its clear decision to do so, manifested by its specific agreements with Respondents, cannot be set aside by Respondents in this lawsuit designed to compel compliance with the tax laws.

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[9] As independent contractors, Respondents paid federal and state taxes on a far more favorable basis than employees, and were able to take deductions for contributions to Individual Retirement Accounts ("IRAs") and business expenses such as travel, meals, entertainment, welfare benefits and depreciation of equipment used in their business without regard to the two percent floor on deduction of business expenses applicable to employees.

The Court repeatedly has noted that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. University of Chicago,* 441 U.S. 677, 688 (1979).

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted). The Court refined the *Cort* test in *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979):

> It is true that in *Cort v. Ash,* the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.

Id. at 575.

No court, aside from the Ninth Circuit below, has held that the tax qualification provisions of the Code create a private right of action.[10] It is hornbook law that "[t]he

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[10] *Reklau v. Merchants Nat'l Corp.,* 808 F.2d 628, 631 (7th Cir. 1986) ("[w]e hold that the district court's refusal to find an implied cause of action under § 401 of the I.R.C. was proper"); *Cowan v.*

provisions of I.R.C. § 401(a) relate solely to the criteria for tax qualification under the Internal Revenue Code . . . I.R.C. § 401(a) does not appear to create any substantive rights that a beneficiary or participant of a qualified retirement trust can enforce." *In re Witwer*, 148 B.R. 930, 937 (C.D. Cal. 1992) *aff'd without opinion*, 163 B.R. 614 (9th Cir. 1994).[11] Microsoft may have misclassified Respondents and jeopardized the tax qualification of its ESPP. It does not follow that Microsoft's intention that Respondents *not* participate in the ESPP, and the correlative clear written intention of Respondents based upon their contracts, should be set aside.

While Respondents (and the majority below) admit that they cannot enforce the Code, they contend that "they can enforce the ESPP, which expressly incorporates the requirements of [Code] § 423." Appellants Opening Brief at 14.[12] This claim, and the majority's conclusion

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Keystone Employee Profit Sharing Fund, 586 F.2d 888, 890 n.3 (1st Cir. 1978) ("Cowan has also argued that he has a cause of action under I.R.C. § 401. He has not spelled out any plausible theory supporting this position, however, and we can think of none. This section does not appear to create any substantive rights that a beneficiary of a qualified retirement trust can enforce"); *Wiesner v. Romo Paper Prods. Corp. Employees' Retirement Plan*, 514 F. Supp. 289, 291 n.2 (E.D.N.Y. 1981) ("[t]here is no merit in plaintiff's repeated arguments that federal jurisdiction is available because the defendants' conduct assertedly entails violations of Internal Revenue Code provisions governing pension plans. The sections relied on . . . do not create a substantive right that a beneficiary, participant or fiduciary could enforce"); *Barlow v. Marriott Corp.*, 328 F. Supp. 624, 631 (D. Md. 1971) ("[i]n sum, the Congress created neither explicitly nor implicitly any right in any employee under section 401(a)(4)"); *see also Salazar v. Brown*, 940 F. Supp. 160, 166 (W.D. Mich. 1996) ("the Sixth Circuit would clearly find it persuasive that Congress has passed thousands of amendments to . . . the Internal Revenue Code, virtually on a yearly basis, without once creating a private right of action").

[11] Code § 401(a) sets forth the requirements for qualified pension, profit-sharing and stock bonus plans.

[12] A copy of Appellants' Opening Brief as filed in the Ninth Circuit has been lodged with the Clerk's office.

on this point, simply overlooks the practical effect of Respondents' claim. Despite their careful word-smithing, Respondents *are* seeking to force Microsoft to comply with the tax qualification provisions of the Code by suggesting that the ESPP should be construed to include them because inclusion would "effectuate[] the plan's intent to be tax-qualified and avoid[] adverse tax consequences." Appellants' Opening Brief at 15. "Effectuating" the plan's intentions in this way, however, is nothing more than allowing individuals to enforce the federal tax laws under the guise of state contract law. The Court should grant the writ to reverse this transparent effort.

CONCLUSION

For all the foregoing reasons, Amici respectfully request that the Court grant the petition for writ of certiorari.

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